



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AUG 24 2010

David A. Smith
8571 Southwestern Blvd., #2235
Dallas, TX 75206

RE: MUR 6247

Dear Mr. Smith:

On January 26, 2010, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, and information you supplied, the Commission, on July 27, 2010, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

If you have any questions, please contact Peter Reynolds, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink that reads "Mark D. Shonkwiler" with a stylized flourish at the end.

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENTS: Friends of David Smith and Lucie Weaver, MUR: 6247
5 in her official capacity as Treasurer

6 David A. Smith
7

8 This matter was generated by a complaint filed by Vickers L. Cunningham. *See*
9 2 U.S.C. § 437(g)(a)(1). The complaint alleged that David Smith ("Smith") and Friends
10 of David Smith and Lucie Weaver, in her official capacity as Treasurer ("the
11 Committee"), violated the Federal Election Campaign Act of 1971, as amended (the
12 "Act"), in connection with a posting made on Examiner's website relating to a fundraiser
13 for Smith's congressional campaign (the "Announcement"), and that Smith failed to file a
14 timely Statement of Candidacy. In light of the *de minimis* amount of the alleged in-kind
15 contribution, the Commission exercised its prosecutorial discretion and dismissed the
16 complaint.

17 Clarity Digital Group, LLC, d/b/a Examiner.com ("Examiner") (together with
18 Anschutz Company ("Anschutz"), the "Examiner Entities") operates a website that
19 provides local information, resources, and perspectives on approximately 240 different
20 cities in North America, almost exclusively through user-generated content. Examiner
21 Resp., 2. Contributors (hired as independent contractors and referred to as "Examiners")
22 are recruited and paid for their contributions to the website on the basis of page views,
23 unique visitors, session length, and advertising performance. *Id.* While Examiner does
24 not review or edit postings submitted by Examiners, it retains the right to remove any

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1 posting in the event the posting does not comply with Examiner's policies, or in the event
2 Examiner finds the posting unacceptable for any other reason. *Id.*

3 Smith was a candidate for the Republican nomination in the race for U.S.
4 Representative from Texas' 32nd Congressional District.¹ A Statement of Organization
5 designating Friends of David Smith as Smith's principal campaign committee was filed
6 on December 30, 2009.

7 Smith became the Examiner assigned to report on Dallas County Republican
8 politics in July 2009, and since that time has contributed approximately 300 postings.
9 See Dallas County Republican Examiner's Articles, [http://www.examiner.com/x-17004-](http://www.examiner.com/x-17004-Dallas-County-Republican-Examiner)
10 [Dallas-County-Republican-Examiner](http://www.examiner.com/x-17004-Dallas-County-Republican-Examiner). On November 3, 2009, Smith posted the
11 Announcement on Examiner's website declaring his candidacy and including information
12 about his "Fundraiser & Campaign Kick-Off," to be hosted at a local restaurant. The
13 Announcement also included a disclaimer stating that the "event notification" was not
14 subject to state reporting requirements. Examiner Resp., 2. In his response, Smith states
15 that he is paid an average of one cent per page view for his postings, and that his
16 remuneration for the posting in question was approximately one dollar. Smith Resp., 2.
17 The Examiner estimated that under their contract, Smith earned a total of \$8.06 for the
18 posting. Examiner Resp., 2.

19 The Complaint alleges that Smith and the Committee accepted prohibited
20 corporate contributions in connection with a coordinated communication in violation of 2
21 U.S.C. § 441b. Complainant further alleges that the Announcement failed to include

¹ The Republican primary was held on March 2, 2010, and the incumbent, Rep. Pete Sessions, garnered approximately 83% of the votes cast, defeating Smith. Office of the Secretary of State of Texas, 2010 Republican Party Primary Election, Election Night Returns at http://enr.sos.state.tx.us/enr/results/mar02_148_state.htm.

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1 disclaimers required by 2 U.S.C. § 441d. Lastly, Complainant alleges that Smith violated
2 2 U.S.C. § 432 by failing to file a Statement of Candidacy with the Commission.

3 After receiving the Complaint, Examiner removed the Announcement from its
4 website and suspended Smith from posting additional material pending the resolution of
5 this matter. Examiner Resp., 3. The Examiner Entities' response to the Complaint
6 argues that: (1) there has been no transfer of value that could qualify as a "contribution"
7 or "expenditure" under the Act; (2) even if the Announcement did qualify as a
8 "contribution" or "expenditure," the press exemption applies; (3) Examiner, as an
9 "independent internet medium," has no disclosure or disclaimer requirement with respect
10 to the Announcement; (4) Examiner is immune from civil liability pursuant to § 230 of
11 the Communications Decency Act of 1996; and (5) the amount in question is *de minimis*.
12 See generally Examiner Resp.

13 Smith also filed a response in which he asks the Commission to dismiss the
14 Complaint brought by a supporter of his political opponent because the Announcement
15 "was treated not as a paid advertisement but as newsworthy content" and Smith's "intent
16 was not to skirt the laws . . . but to make public an announcement." Smith Resp., 4.

17 The amount of the alleged in-kind contribution in this matter is *de minimis*.
18 Additionally, the evidence shows that Examiner removed the Announcement from its
19 website upon receiving notification of the Complaint. In light of the overall
20 circumstances, it would not be an efficient use of the Commission's resources to pursue
21 this matter further. Accordingly, the Commission exercised its prosecutorial discretion
22 and dismissed the complaint as to David Smith and Friends of David Smith and Lucie
23 Weaver, in her official capacity as Treasurer. See *Heckler v. Chaney*, 470 U.S. 821, 831

- 1 (1985). The Commission did not determine the applicability of the press exemption or
- 2 Section 230 of the Communications Decency Act of 1996 to this matter.

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